Supreme Court of the United States

OCTOBER TERM 1940

CHENILLE MANUFACTURING CO. INC., HARRY FARBER and RICHARD FARBER, *Petitioners,*

against

MOSES J. SCHIFRIN, *Respondent.*

No.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinions of the Courts Below

The opinion of District Judge Conger in deciding the original motion (R. 18) is reported 34 F. Supp. 400. Judge Conger's opinion on reargument (R. 34) is not reported. The opinion of the Circuit Court of Appeals (R. 50) is reported 117 F. (2d) 92. The Court of Appeals rendered no separate opinion on the denial of petitioners' motion to dismiss the appeal.

ARGUMENT

I

Whether the District Court had jurisdiction *in personam* over petitioners on November 24, 1939, is a pure question of law: a court without jurisdiction cannot exercise discretion and the District Court cannot exercise discretion in determining whether it has jurisdiction. There can be no jurisdiction by estoppel.

This proposition seems self-evident, axiomatic. The converse would be repugnant to American principles of jurisprudence, which includes due process. And this is not affected by the circumstance that the case at bar lies in equity, especially under the new Federal Rules of Civil Procedure, which provide for only one form of action (Rule 2). Even a court of equity must acquire jurisdiction in personam *before* it can apply equitable doctrines. This is always a condition precedent.

But in the case at bar, the Circuit Court of Appeals has based its reversal on supposed equitable principles. The gist of its opinion is that since petitioners intended to authorize a submission to the jurisdiction of the court and a consent to judgment, it would be inequitable to permit them to question the jurisdiction of the District Court and require respondent to litigate the case on its merits.

The District Court held that petitioners' intention was not fulfilled. *The Court of Appeals did not find the essential jurisdictional facts, but held that petitioners are estopped to deny them.*

"Jurisdiction by estoppel" is a novel and hazardous doctrine. To allow this decision to stand would set a danger-

ous precedent: it would be a step in whittling away our accepted standards of due process.

By its very nature, "due process" requires rigid application of the accepted tests of jurisdiction *in personam.* It is of the highest importance that an attorney should be able to advise his client with confidence, whether an action has been commenced against him. There must be no vagueness or uncertainty, as indeed there must if this doctrine is followed.

Once we depart from the accepted tests, we shall be sailing uncharted seas. General application of the doctrine of "jurisdiction by estoppel" would lead to astounding results. By parity of reasoning, a plaintiff could choose his own method of serving process, without regard to statutes and rules, and cast upon his defendant the burden of moving promptly to quash service, under pain of being estopped to question it after the judgment is entered. Such reasoning would even estop a defendant from raising the question after a judgment is entered on default after service outside the territorial jurisdiction of the court. It would preclude a defendant from claiming a judgment is void though based on a false affidavit of personal service, if the plaintiff can prove that the defendant knew, before the entry of judgment, that the false affidavit had been filed.

> " 'Due process' * * * inhibits the taking of one man's property and giving it to another contrary to settled usages and modes of procedure, and without notice or an opportunity for a hearing."
>
> *Ochoa* v. *Hernandez,* 230 U. S. 139, 161.

> "But if there is no appearance of the defendant and no service of process on him, the case becomes in its essential nature a proceeding *in rem,* the only

effect of which is to subject the property attached * * *."

Pennoyer v. *Neff*, 95 U. S. 714, 725.

In that case this Court held that a judgment rendered *in personam* against a defendant without jurisdiction of his person is not only erroneous, but void.

> "It is thoroughly settled that a personal judgment against one not before the court by actual service of process, or who did not appear in person or by an authorized attorney, would be invalid as not being in conformity with due process of law."
>
> *National Exchange Bank* v. *Wiley*, 195 U. S. 257, 269.

An examination of the facts of this case will demonstrate the wisdom of adhering strictly to the settled law on this question.

II

He who asserts jurisdiction has the burden of proving affirmatively all the necessary facts. There can be no estoppel to deny them.

Jurisdiction over the person of the defendants is not presumed. It cannot be proved negatively, and he who denies it need not disprove it. True, if one raises the point when the docket purports to show jurisdictional facts, he has the burden of going forward. But the ultimate burden of proof is upon him who alleges jurisdiction.

> "* * * Where the jurisdiction of the court is made to depend upon the existence of some fact of which there is an entire absence of proof, it has no

> authority to act in the premises, and if it, nevertheless, proceeds and entertains jurisdiction of the proceeding, all of its acts are void * * * ."
>
> *Fisher* v. *Langbein,* 103 N. Y. 84, 94.

So, too, if jurisdiction is claimed by virtue of a notice of appearance, whose validity is brought into question, he who asserts jurisdiction must carry the burden of proving the validity of the appearance as a necessary link in the chain.

In order to enter judgment, a litigant must first show facts which on their face prove the necessary jurisdictional facts. Respondent accepted that as the law when he filed the papers purporting to be a notice of appearance and a stipulation signed by an attorney of the court. But petitioners proved that those papers are not what they purport to be, that they are not signed by an attorney of the court. That being so, and no other jurisdictional fact being proved, on what does the District Court's jurisdiction *in personam* rest?

III

As a matter of law, since Mr. Aaron was not an attorney or officer of the District Court, he could not confer on that Court jurisdiction *in personam* over defendants by signing a notice of appearance; the stipulation he signed is equally void.

Jurisdiction over the person of a defendant is lacking unless it is made to appear in one of three ways; (1) due service of process, (2) a valid personal general appearance

of a natural person, or (3) a valid general appearance by an attorney-at-law *who is an officer of the particular court.*

In the instant case there was no service of process. No defendant purported to appear in person, and it is settled that the principal defendant, the corporation, could not appear except by a duly admitted attorney (*Osborn* v. *Bank of the U. S.,* 9 Wheat (22 U. S.) 738, 829-830; *Commercial & R. R. Bank* v. *Slocomb,* 14 Pet (39 U. S.) 60, 65; *Heiskell* v. *Mozie,* 82 F. (2d) 861; *N. Y. Civil Practice Act,* § 236, as amended 1939).

Petitioners intended to appear by an attorney of the District Court. They never intended to appear in person. To say that they appeared in person by an agent would be a contradiction in terms. It would also conflict with the settled law that only an attorney-at-law may represent another in court. It would mean that a layman may practice law.

This leaves only one question: Did petitioners enter an appearance by attorney?

What is it that gives to an appearance by an attorney-at-law a force which is not an attribute of an appearance by an attorney-in-fact or lay agent? This question has been abundantly analyzed in cases dealing with unauthorized appearances by admitted attorneys of the respective courts:

> "Certain gentlemen first licensed by government are admitted, by order of court, to stand at the bar with general capacity to represent all the suitors in the court. The appearance of any one of these gentlemen in a cause has always been received as evidence of his authority."
>
> *Osborn* v. *Bank of the U. S.,* 9 Wheat (22 U. S.) 738.

"The order of admission is the judgment of the court that the parties possess the requisite qualifications as attorneys and counselors, and are entitled to appear as such and conduct causes therein. From its entry the parties become *officers of the court* * * *." (Italics ours.)

Ex parte Garland, 4 Wall. 333, 378.

"When, however, in the development of the due administration of justice, courts required special qualifications as requisite to persons practicing law before them, *no unregistered person was permitted to appear and plead for another.* In a court of record an attorney could appear only in that capacity and not as an agent." (Italics ours.)

Aberdeen Bindery v. *Eastern States Printing & Publishing Co.,* 166 Misc. (N. Y.) 904, 3 N. Y. S. (2d) 419, 422-423.

Denton v. *Noyes,* 6 Johns. (N. Y.) 296, held that a judgment entered against a resident, based upon an unauthorized appearance by an admitted attorney, is not void. Referring to that case, the New York Court of Appeals said:

"That case is expressly put upon the ground that the party appearing was a licensed attorney, and that *he was an officer of the court* * * *." (Italics ours.)

Perry v. *Reynolds,* 65 N. Y. 179, 188.

"It is the official position of the attorney *as an accredited officer of the court* that gives rise to the implication that he possesses the authority he assumes to exercise." (Italics ours.)

Mayor v. *Smith,* 61 Super. (N. Y.) 374, 20 N. Y. Supp. 666.

> "Receiving their authority from the court, they are deemed its officers. Their commissions declare them entitled to confidence, and, in a just sense, their license is an assurance, not only of their competency, but of their character and title to confidence.
>
> "The direct control of the courts over them as officers * * * is retained and exercised as a guaranty of their fidelity."
>
> *Hamilton* v. *Wright,* 37 N. Y. 502.

In *Morse* v. *Lewis,* 54 F. (2d) 1027, cert. den. 286 U. S. 557, an affidavit of prejudice of the judge was submitted, together with the certificate of a man who was admitted to the bar in Texas, but not in the district court in which the action was tried. The certificate was held to be insufficient *on that ground.*

In the instant case the judgment was vacated by the same judge who signed it. By doing so he said that a fraud had been committed upon the court, that he would not have signed the judgment in November 1939 had he then known the fact of Aaron's non-admission. Nor was Judge Conger informed, when he signed the judgment, that petitioners were then operating under a license, so that they could not then have been infringing or threatening to infringe.

Mr. Aaron was not an officer of this District Court. In it he was only a layman, regardless of his admission in the District of Columbia and as a registered "patent attorney".

The question what constitutes a valid appearance is not touched upon in the Federal Rules of Civil Procedure, apparently because it is covered by statute and local rules.

Title 28 U. S. Code § 394 and General Rule 3 of the District Court are so plain and unambiguous that there is no room for construction. The statute says that parties may plead their causes only in person or "by the assistance of such counsel or attorneys at law as, *by the rules of the said courts,* respectively, are permitted * * *." The rule provides that *"Only* an attorney or proctor *of this court* may enter appearances, sign stipulations * * *."

If that means anything, it means that Mr. Aaron was not empowered—even forbidden—to enter an appearance or sign a stipulation. Reading the statute and the rule together, he was powerless to confer on the District Court jurisdiction *in personam* over the defendants; and District Judge Conger correctly held that "the papers signed by him are void".

The Circuit Court of Appeals purported to follow *Kerr* v. *Walter,* 104 App. Div. (N. Y.) 45, 93 N. Y. Supp. 311, the only case which superficially appears to have departed from the New York rule of law that a judgment entered after proceedings participated in by a pretended attorney-at-law will always be vacated. But in *Kerr* v. *Walter* the Appellate Division considered itself bound by the record on appeal, which recited an appearance by "defendant's counsel". *The attorney of record retained by the defendant was duly admitted* to the Bar, and it was a clerk from his office who entered the appearance—which clearly distinguishes that from the instant case. Furthermore, no attempt was made by the client to repudiate that appearance, only by the attorney of record. The Appellate Division held that "the real *counsel* who sent him there cannot avail himself of the imposture * * * which he made possible." There was no reason for granting relief to "the real counsel". He knew,

when he sent his clerk to court, that the latter was not admitted. That court did not hold that the *client,* the defendant, could not have repudiated the appearance.

However, we further submit that the *Kerr* decision is not sound, for the reasons stated in this and previous points of this brief. Furthermore, the court gave no consideration to the interests of the client, who never intended to be represented in court by a layman, and probably never authorized it. Possibly the New York court was influenced by the dangers inherent in permitting repudiation of the acts of law clerks, knowing that in practice, court calendars are commonly answered by unadmitted clerks. Perhaps that is an example of "hard cases make bad law".

In *Nardi* v. *Poinsatte,* (D. C., N. D., Ind.) 46 F. (2d) 347, the action was brought upon a judgment entered on confession pursuant to a cognovit note which authorized an appearance on behalf of the defendant by "any attorney of any court of record". Judgment had been entered in Illinois on an appearance of the defendant, the maker of the note, by an attorney in fact. The court held:

> "The defendant, who was the maker of the note, did not authorize an attorney or an attorney in fact or an attorney at law, but only an attorney of a court of record. There is nothing in the proceedings in this case that discloses that Reuben Freedman was an attorney of any court of record, and therefore the court was without jurisdiction to proceed and enter the judgment."

The federal statute, the rule and the general law apply with equal force to the stipulation signed by Aaron. It, too, is void.

IV

The Court of Appeals exceeded its power when it in substance nullified a rule duly adopted by the District Court. Admission to the bar of the District Court is not a mere "formal ritual".

General Rule 3 is plain and unambiguous. Such rules are adopted *for the protection of litigants.* If "sanctions should be applied only against those * * * who themselves infringe it" (R. 52), such rules will fail of their purpose, for that will be of no help at all to a litigant.

Referring to § 270 of the New York Penal Law, which is similar to General Rule 3, it has been held:

> "The clear and only permissible intent of the legislature was to protect the general public from exploitation at the hands of unscrupulous or unskilled persons posing as lawyers, or unauthorized persons demanding or receiving compensation for purely legal services."
>
> *People* v. *Black,* 156 Misc. (N. Y.) 516, 282 N. Y. Supp. 197.

If, as the Circuit Court suggests, a rule of court is sterile unless it expressly provides a penalty for its violation or a specific method of enforcement (R. 52), then a large proportion of court rules are ineffectual—including most of the rules of this Court, and the Federal Rules of Civil Procedure. Surely that is not so.

This rule is not merely addressed to lay agents. It gives notice to the whole world that this District Court will not recognize an appearance by a non-admitted agent.

Laymen—and lawyers, too—universally accept at face value a man who says he is a lawyer. Even respondent's attorney did not examine the roll of attorneys to learn whether Aaron's name was there. It is manifest that petitioners were not negligent and that they were defrauded.

It would not serve the ends of justice to permit a decision to stand which is based on such false reasoning as that admission to the bar of the District Court is only a "formal ritual". It might as well be said that after passing the bar examination a candidate need not bother taking the oath of admission and being formally enrolled. Certainly admission is not just a "formal ritual" to one who, like Aaron, is not even qualified.

According to the reasoning of the Court of Appeals Aaron's appearance would bind petitioners even if Aaron had been disbarred by this District Court.

A rule of court "has the force of law, and is binding upon the court as well as upon the parties to an action, and cannot be dispensed with to suit the circumstances of any particular case". (*Rio Grande Irrigation Co.* v. *Gildersleeve,* 174 U. S. 608.)

> "Obviously such a rule cannot be nullified by a custom in procedure."
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> *U. S.* v. *French* (C. C. A. 8th), 95 F. (2d) 922, cert. den. 305 U. S. 620.

In *Weil* v. *Neary,* 278 U. S. 160, this Court held that a circuit court of appeals was not at liberty to disregard a rule of a district court.

While the Court of Appeals did not expressly nullify this rule, it did so by necessary implication. It refined the rule away to the vanishing point when it suggested that

"a mild reprimand" to Mr. Aaron would be a "sufficient" penalty (R. 52).

With certain exceptions, such as the Federal Rules of Civil Procedure, one court may not make rules for another court, or annul the rules duly adopted by another court. A decision which does so should not be allowed to stand as a precedent.

V

If the District Court lacked jurisdiction over defendants on November 24, 1939, the judgment then entered is void and must be vacated without regard to the collateral effects of such vacatur.

The Court of Appeals says that to vacate the judgment would be unfair to respondent. Assuming that position to be well taken, such considerations have no place in a discussion of jurisdiction.

Judgments have been vacated for lack of jurisdiction even after the death of an indispensable witness or after the expiration of the statute of limitations or the development of other bars to the prosecution of the action, such as removal of the defendant from the jurisdiction or abatement by death of the defendant. Those are certainly much harsher results than in the case at bar, where the respondent may still prosecute the action to its conclusion on the merits.

> "Considerations of hardship can play no part in the decision of a case, where the court clearly lacks jurisdiction."
>
> *Goldstone* v. *Payne*, (C. C. A. 2d) 94 F. (2d) 855, cert. den. 304 U. S. 585.

But if such considerations are relevant, what of the petitioners? Can they never have their day in court? Should these innocent clients, victims of the scoundrel Aaron, be forever barred from defending the action on the merits? Must they suffer the loss of this part of their business because of Aaron's fraud? Are they relegated to a worthless lawsuit against an impecunious rascal?

In an unreported decision of the United States District Court for the Southern District of New York, *Schifrin* v. *Marvel Mills, Inc.*, dated April 10, 1941, respondent sued a competitor of petitioner corporation for infringement of two patents, one being the same patent mentioned in the complaint in the case at bar. Petitioner Harry Farber testified as a witness for the defendant, and produced a device which was marked "Defendant's Exhibit Z". Judge Hulbert held:

> "The defendants have shown by Exhibit Z that in 1926 an electrically heated contrivance was built * * * which also contained tubes that were threaded * * * and that the chenille which they have been making has been curled in accordance with the uses heretofore disclosed.
>
> "* * * I feel that whatever the defendants have done here has been in accord with those uses, and that they are therefore free from the charge of infringement, and that it is unnecessary that I should pass upon the validity of either patent in this action."

Thus we see a practical application of the danger of attempting to decide the question of jurisdiction on the basis of supposed equitable considerations. This decision of Judge Hulbert leaves no room for doubt that petitioners

were not infringing respondent's patent, and that a grave injustice would be done them by permitting this judgment against petitioners to stand.

Once again it appears that departure from the established rules of law governing the single question of jurisdiction is fraught with dangerous uncertainty and should not be countenanced by this Court.

VI

If equitable considerations be relevant, the Court of Appeals misconceived them: petitioners were guilty of no imposture.

This obviously requires an analysis of the opinion of the lower appellate court. That opinion declares that "defendants show no prejudice to themselves from that fact [Aaron's non-admission], however; nor do they seriously attempt to make out a case of having been misled by the incompetent advice of one masquerading as an attorney" (R. 51).

In the first place, that is irrelevant to the single question of jurisdiction. In the second place, it is asking for the impossible. In no instance can one demonstrate that an admitted attorney would have given different advice. One may happen to receive good legal advice from a layman, bad advice from a lawyer. *There is only one standard of measurement*—his admission or non-admission to the bar of the place where he practices and of the particular court in which he appears. *By that standard Aaron was incompetent.*

In New York, where he practices (R. 6, 16), Aaron is a layman, except only that the law permits him to use the misleading title of "patent attorney" (U. S. Code, Title 35, § 11). Since petitioners had no business to transact with the Commissioner of Patents, Aaron should have refused any employment whatever. Assuming that he has only practiced to the extent of his license, he has had no experience in drawing contracts or in litigation.

When petitioners authorized Mr. Aaron to appear and consent to judgment, they were acting upon his "insistent" advice, believing in good faith that he "was a lawyer licensed to practice law in New York and before this [the District] Court" (R. 17). Actually it now appears that Aaron gave such advice because he could not defend any litigation in any court in New York, state or federal. He had a pecuniary motive to misdirect his clients, to settle the matter any way at all and thus hold on to it and collect a fee. If he had advised petitioners to litigate, they would have had to employ other counsel.

As a practical matter this was not a settlement: it was a complete surrender. A competent unbiased attorney would not have given such a blanket consent to judgment (R. 7), which even includes costs and an assessment of damages, especially when his client, petitioner corporation, was getting only a short term license, and the patent was in his opinion invalid (R. 17). Aaron left his client in the position of being compelled to abandon this branch of its business on the expiration of the license.

Petitioners were entitled to honest as well as competent advice. They got neither.

If this is not a showing of prejudice from Aaron's non-admission, we must confess our inability to conceive facts

which would prove prejudice. Moreover, such prejudice is conclusively presumed.

> "It is, however, not a matter of penalizing anyone (other than the person guilty of the offense), but, rather a matter of vindicating the dignity of an honorable profession that the rule has been established that all proceedings participated in by such an unauthorized person are rendered nugatory and ineffectual. In this view, therefore, actual prejudice to any party need not be shown, but is *conclusively* presumed." (Italics ours.)
>
> *Colton* v. *Oshrin,* 155 Misc. (N. Y.) 383, 278 N. Y. Supp. 146.

It is begging the question to say, as does the opinion of the Circuit Court, that "these steps carried out an agreement which the individual defendants for themselves and the corporate defendant made in person * * *" (R. 51). That agreement was made on Aaron's biased advice, and was the direct result of his non-admission. One result of Aaron's fraud cannot justify another. Moreover, the mere making of an agreement could not confer jurisdiction on the District Court. Would petitioners have made such an agreement if they had been properly advised by an attorney competent to defend the infringement suit?

Surely respondent may not urge that the consent to judgment and the sublicense agreement were interdependent when he insisted that he was "no party to such agreement," that he "never negotiated the terms of such agreement" and "was not concerned with the terms of such agreement" (R. 31-32).

Says the opinion: "Defendant Richard Farber, as president of the defendant corporation, had power to act for the corporation" (R. 51). In doing what? He could not appear for it in the District Court; he did not sign any paper which was before that court on November 24, 1939. So that fact is irrelevant. *The question is one of jurisdiction, not agency.*

Next the opinion says that "the plaintiff could have obtained his affirmative relief in this action in any event by proving these conceded facts" (R. 51). What conceded facts? None that affect jurisdiction. There was no concession of any facts, only a blanket consent to judgment (R. 7).

The opinion cites many cases holding that the court should protect the innocent client in such circumstances, but the Court of Appeals declined to afford these petitioners any protection or relief. The opinion fails, however, to cite *People* v. *James,* 150 Misc. (N. Y.) 390, 269 N. Y. Supp. 626, from which we quote:

> "* * * the cases all seem to hold that where a trial is conducted by a person who is forbidden to conduct the trial of the same it renders the judgment void."

No undue hardship will befall the respondent if the judgment is vacated. He will be at liberty to prosecute the action. If he has a valid patent which defendants are infringing, he will prevail; if his patent is not valid or if defendants are not infringing, there is no reason why he should be empowered by the court to force petitioners to abandon this branch of their business and lose their large investment in it.

Estoppel is an equitable doctrine, invoked to prevent a party from taking advantage of his own negligence or wrongdoing. It applies only when there is proof that one has made a representation of a fact *which he then knew or should have known to be false,* in reliance on which the other party has made an irretrievable change of position. Petitioners in fact made no representation. They in good faith believed that Aaron was an attorney of New York and the District Court. Aaron was the impostor, not petitioners, who are his victims. And respondent has made no irretrievable change of position to his detriment.

Indeed he has presumably benefited from the collection of large royalties by his exclusive licensee while the license was in effect.

Thus it is seen that the equities really weigh heavily in favor of petitioners.

It is manifestly unjust to attempt to apply equitable considerations on the scant record presented by a motion based solely on lack of jurisdiction. That is by its nature a technical question, and the movant goes beyond that only at the risk of having the court hold that by discussing the merits he has appeared generally. In fact petitioners' attorney specifically stated that he was so limiting himself (R. 32). Thus the lips of the movant are sealed as to any but jurisdictional questions, while his opponent can lose nothing by discussing other facts at length. Therefore on other points this record contains only an *ex parte* statement; and if equitable considerations are controlling the case should be remanded to the District Court for a hearing of witnesses, and for the exercise of that court's discretion.

VII

The jurisdictional defect was not waived by defendants making their motion to vacate the judgment on other than jurisdictional grounds.

Respondent urges that even if the judgment was void for jurisdictional defects when entered, petitioners waived those defects by making their motion to vacate the judgment on the ground that their consent was a part of an illegal bargain.

In the first place, when the other notice of motion was served on May 4, 1940, petitioners had not yet discovered the fact of Aaron's non-admission (R. 16). So no inference can be drawn that they intended to waive that defect.

In the second place, the other motion was not granted or denied; it was merely dismissed (R. 29). That leaves the proceedings in the same condition as though the motion had never been made. A motion to vacate a judgment, which is not acted upon, does not waive objections to jurisdiction (*Todd* v. *De La Mott,* 9 Colo. 222, 11 P. 90).

Furthermore, while a voluntary general appearance constitutes a submission to the jurisdiction of the court, it is effective only from the date when the appearance is made, and is not retroactive. It is not a waiver of past defects in jurisdiction.

> "The judgment, if void when rendered, will always remain void. * * * The validity of every judgment depends upon the jurisdiction of the court before it is rendered, not upon what may occur subsequently. * * *
>
> "To give such proceedings any validity * * * if that involves merely a determination of the personal

> liability of the defendant, he must be brought within the jurisdiction by service of process * * * or his voluntary appearance."
>
> *Pennoyer* v. *Neff*, 95 U. S. 714, 728, 733.

A voluntary appearance has no higher quality than service of process.

> "A voluntary general appearance of the defendant is equivalent to personal service of the summons upon him."
>
> N. Y. Civil Practice Act § 237.

Clearly a plaintiff cannot vitalize a void judgment by effecting service of process after the judgment is entered. Service of process on petitioners on May 4, 1940, would not have vitalized this judgment entered November 24, 1939. If the service of the other motion papers did amount to a voluntary appearance, it did not relate back and cure all defects.

If jurisdiction dated only from May 4, 1940, petitioners were entitled to twenty days thereafter in which to answer the complaint.

> "It is very true that a general appearance brings the party into the litigation as effectively as though there were no defects in the summons or service. Not infrequently this has been referred to as a waiver of defects in the summons or the service.
>
> "But such expressions are to be taken only as meaning that the party cannot, after a general appearance, escape the jurisdiction of the court because of a defect in the process. * * *
>
> "* * * a general appearance * * * does not relate back and cure such defects [in summons or service]

for all purposes but takes effect generally *only as of the time of the general appearance.* * * * it simply put him in court *from then on* for all purposes." (Italics ours.)

U. S. v. *French* (C. C. A. 8), 95 F. (2d) 922, 926 cert. den. 305 U. S. 620.

"It is self-evident that such an appearance could not relate back to the date of the rendition of the so-called judgment so as to vitalize that which never had life."

State v. *District Court,* 51 Nev. 206, 273P. 659, 660.

"An appearance for special purposes before judgment, coupled with a demand for relief inconsistent with a claim of want of jurisdiction, is a general appearance, and a waiver of defects in the service of the summons. *But where the appearance is made after judgment, and for want of proper service or process the judgment is void, a different rule applies."* (Italics ours.)

Spencer v. *Court of Honor,* 120 Minn. 422, 426, 139 N. W. 815.

"Appearance after such a judgment is entered against a party, whether general or special, will not cure a want of jurisdiction as to the judgment previously obtained, general statements in the texts and decisions to the contrary notwithstanding."

Lore v. *Citizens Bank* (Ariz.), 75 P. (2d) 371.

"A party does not waive the question of jurisdiction or validate a void judgment by a general

appearance in support of a motion to set the judgment aside."

Bennett v. *Supreme Tent,* 40 Wash. 431, 82 P. 744, 746.

"* * * the moving party should not be deemed to have conferred jurisdiction restrospectively so as to render valid the previous judgment, which, being unsupported by any authorized judicial proceedings, was not merely voidable, but void, and in legal effect a nullity."

Godfrey v. *Valentine,* 39 Minn. 336, 40 N. W. 63, citing
Gray v. *Hawes,* 8 Cal. 563;
Shaw v. *Rowland,* 32 Kan. 154; 4 P. 146;
Boales v. *Shules,* 29 Iowa 507;
Briggs v. *Sneghan,* 45 Ind. 14;
State v. *Cohen,* 13 S. C. 198;
Moore v. *Watkins,* 1 Ark. 268.

Perhaps the error is in the use of the word "waiver". A voluntary appearance is a submission to jurisdiction, even in the absence of any element of waiver.

True, there are cases to the contrary, holding that a voluntary appearance does waive past defects, but it is submitted that they are not based on sound reasoning. Their tendency is to make a lawsuit a game of tricks and traps, to say that a defendant who happens to do something which in law amounts to a general appearance, is trapped so that he cannot raise questions based on previous defects in jurisdiction.

These contrary cases are based on the principle of waiver. But in each, it will be found that the defendant,

when he entered his appearance, had full knowledge of the facts which formed the basis of his subsequent attack on jurisdiction—a clear mark of distinction from the case at bar.

> "One cannot waive or acquiesce in a wrong while ignorant that it has been committed."
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> *Pence* v. *Langdon,* 99 U. S. 578, 581.

> "A waiver is an intentional relinquishment of a *known* right, an election by one to dispense with something of value, or to forego some advantage that might be insisted upon. A waiver exists only where one *with full knowledge* of a material fact does or forbears to do something inconsistent with the existence of the right, or of his intention to rely on that right. * * * *Waiver is but another name for estoppel."* (Italics ours.)
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> *Cable* v. *U. S. Life Ins. Co.* (C. C. A. 7th), 111 Fed. 19, 31.

> "A waiver is the intentional relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right. * * * This court said in *Williams* v. *Neely,* 134 Fed. 1, 'that the essence of waiver is estoppel, and that *where there is no estoppel there is no waiver'* * * * and further laid down the indespensable elements of an estoppel as ignorance of the party invoking the estoppel, a misrepresentation by the party estopped which misled, and 'an innocent and deleterious change of position in reliance upon that right'." (Italics ours.)
>
> G. *Amsink & Co.* v. *Springfield Grocer Co.* (C. C. A. 8th) 7 F. (2d) 855, 860.

Since respondent's attorney himself did not examine the roll of attorneys to learn whether Aaron was in fact an attorney of the District Court, it does not lie in his mouth to say that respondents were negligent because they did not do so. The average reasonably prudent man certainly does not take that extraordinary precaution.

In addition, when petitioners made the other motion, they were acting under the compulsion of Rule 60(b) of the Federal Rules of Civil Procedure, which limits the time for making such a motion to six months.

There is no sound reason why a general appearance should be held to waive all past defects in jurisdiction, unless it appears conclusively that the defendant intended to be bound by the previous proceedings, at a time when he knew his rights. The authorities holding that a general appearance does not *ipso facto* have that effect, are well reasoned, while the contrary cases merely assume it to be the law that past defects are waived, without advancing any convincing reason for such a rule. A defendant's attorney may believe that he has good ground for moving to vacate a judgment on jurisdictional grounds and that he also has other sufficient basis for such motion. He may be willing to submit to the jurisdiction on condition that he have an opportunity to defend. The fact that he happens to make the second motion first should not preclude him from making the other later. They are both attacks on the judgment and the law should not make a fetish of hyper-technicalities.

However, in no event should it be held that past defects are waived by a general appearance made while the defendants are ignorant of the factual jurisdictional defects.

VIII

The order entered June 10, 1940, was not appealable after reargument was granted.

This Court has consistently held that where a petition for rehearing is entertained, an appeal may not be taken until it is disposed of.

> "The rule is that if a motion or petition for rehearing is made or presented in season and entertained by the court, the time limited for a writ of error or appeal does not begin to run until the motion or petition is disposed of. Until then the judgment or decree does not take final effect for the purposes of the writ of error or appeal."
>
> *Aspen Mining & Smelting Co.* v. *Billings,* 150 U. S. 31, 37.

> "Where a petition for a rehearing is entertained, the judgment does not become final for purposes of our review until such petition has been denied, or otherwise disposed of, and the three months limitation begins to run from the date of such denial or other disposition."
>
> *Citizens Bank* v. *Opperman,* 249 U. S. 448, 450.

Likewise, in *Voorhees* v. *John T. Noye Mfg. Co.,* 151 U. S. 137, this Court held that entertaining and considering a motion for rehearing keeps the cause within the court's jurisdiction, notwithstanding a previous entry allowing an appeal and, when the motion is denied, a new appeal be-

comes necessary. A motion is not formally denied until an order is entered denying it.

Therefore the Circuit Court of Appeals never acquired jurisdiction over an appeal from the order entered June 10, 1940, and should have granted the motion to dismiss that appeal.

IX

Notice of appeal was filed prematurely as to the order dated July 1, entered July 11, 1940.

The single notice of appeal was filed July 3 and the appeal bond was filed the same day (R. 44A). Clearly the appeal was premature, since this order was not entered until eight days after the notice of appeal was filed.

No appeal was taken from this order "within thirty days from the entry of such order" (U. S. Code, Title 28, § 227). Under § 227, as well as under § 230, the time to appeal does not run from the date an order or judgment is signed, but from its entry; and an appeal does not lie until an order is "entered". (*Palleys* v. *Black River Co.,* 113 U. S. 81; *Coppard* v. *Atascoa County State Bank,* 56 F. (2d) 1023).

Therefore the Court of Appeals never acquired jurisdiction over the appeal from the second order and the motion to dismiss that appeal should have been granted.

It is significant that the Court of Appeals did not specify which order it reversed (R. 68). The mandate refers to both orders.

X

Neither order is appealable because they make no final disposition of the litigation.

The District Court orders did not purport to dismiss the complaint or the action or to make any other final disposition of the litigation. They left the plaintiff free to prosecute it.

The Court of Appeals apparently accepted that view, but held that "since this constituted a denial of interlocutory relief, the appeal herein brings before us the issue of its correctness. 28 U. S. C. A. § 227" (R. 51).

It is submitted that this was not "a denial of interlocutory relief" under § 227. That section refers to a denial of interlocutory relief only after the court has jurisdiction of the cause and of the parties. The District Court held that it did not have jurisdiction over petitioners.

CONCLUSION

The prayer of the petition should be granted.

Respectfully submitted,

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